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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1135

SOL ANDREWS, ET AL.,

Petitioners,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DAVID H. CAPLOW and
SOL ANDREWS,
Counsel for Petitioners.

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In The

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October Term, A. D. 1942.

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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

May It Please the Court:

The petition of Sol Andrews as representative, et. al., by David H. Caplow and Sol Andrews and their counsel to this Honorable Court for Writ of Certiorari, respectfully shows the following:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. In the maelstrom of world events, civil rights are sometimes apt to be considered insignificant compared with the more pressing problems of a country at war. Yet are not we at war to preserve civil rights? To preserve the American way of life? Of vast importance then is the preservation of the rights of the many millions who are concerned in the matter here involved. The practice of uniting for the common good or in a common enterprise is as old as our Government. Mutual insurance derives its name from the common reciprocal association of the members, uniting for their common or mutual benefit, substituting mutual responsibility for capital investment, contributing their premiums into the common funds to operate the business, pay the losses and build surplus.

The rights of these millions of former members, whose memberships have terminated, are involved in the case at bar. It is estimated that there are more than fifty million former members of mutual life insurance companies whose policies have lapsed or otherwise terminated.

This matter involves the right of members of mutual life insurance companies to participate in the earnings of the companies. It concerns the rights of members to obtain their insurance at actual cost and to realize at the proper time a return of their proportionate interest in surplus where, during the periods of membership, the members have contributed thereto by the payment of premiums conceded to be in excess of cost. This matter likewise involves the question of whether or not there is any difference between a stock insurance company

where policyholders have no interest in the capital of the company, and a mutual company where policyholders are at the same time members and substitute mutual responsibility for capital investment. In a stock company the rights of policyholders are limited to the terms of their policies. The stockholders are the owners of the companies, and the stockholders then are the ones entitled to profits made. In mutual companies policyholders are likewise members and as such have a different relationship to the company than as mere policyholders. They, as members, are (as stockholders in a stock company) owners of the company.

2. Fifteen Plaintiffs, (each a former member of one of the mutual life insurance companies, respondents) filed separate representative suits against the respondents, seeking an accounting and distribution of proportionate shares of a common interest in undistributed surplus funds, withheld by the respective companies, which had accumulated during their memberships. The second amended complaint alleged, in each instance, that the respondents operated as mutual life insurance companies and that the Plaintiff in each case and those he represented were former members of the companies and had held insurance policies therein; that during the periods of membership, the companies had accumulated funds and assets in excess of the reserves required to pay current expenses, losses, dividends and to meet all contingent liabilities (R. 5). Said accumulated funds and assets in excess of said reserves have been designated as "surplus" or unassigned funds (R. 5).

Said complaint further alleged that said surplus and the interest earned upon the investments thereof equitably belongs to all the policyholders who contributed

thereto in proportion to their respective contributions and that Plaintiff and other policyholders have so contributed to said surplus (R. 5); that said surplus is the sum remaining out of the respondent's gross income after deducting reserves, dividends, losses and expenses of operation; and has also arisen from savings upon the assumed rate, from the loading, so called for expenses and the gains from lapsed and surrendered policies; part of surplus now held by respondent was so created by the lapsing of petitioner's policies, and the policies of many thousands of formers members in similar situation, the portion of reserve on such policies and savings being transferred to surplus, and originally constituted part of premiums paid by petitioner and others in class he represents (R. 6).

Premiums contributed by Plaintiff and other policyholders were commingled in one common fund and jointly invested by respondent in various ways as a result of which, profits accrued and surplus created greatly in excess of $3000.00. That the amount of said surplus funds withheld by respondent was in excess of $3000.00 and that the aggregate interest of petitioner and other former members of respondent whom petitioner represents in said common surplus fund in which petitioner and class of former members represented by petitioner have a joint and undivided interest, is in excess of $3000.00 exclusive of costs and interest (R. 6).

Paragraph 7 of said amended complaint states that Plaintiffs did not know and had no means of knowing that a surplus was being accumulated over and above the dividends that were declared until shortly before the filing of the suits (R. 7).

Paragraph 10 alleges that the defendant is withholding so much of said surplus as would be distributable as a constructive trust for the benefit of petitioner and other members of the class represented (R. 8).

Paragraph 11 states that respondent owed petitioners and other former members the duty to ascertain and distribute in full their proportionate interest in surplus (R. 8). Each case prays for an accounting and when the fund is determined, the appointment of a receiver for the purpose of receiving the fund which the court might determine should be distributed and of making distribution in accordance with the instructions of the court.

Each of the respondents filed a motion to strike and to dismiss setting forth various grounds which may be grouped under the following:

1. The complaint fails to state a cause of action upon which relief may be granted (R. 40).

2. The Federal Court lacks jurisdiction to hear the matter for the reason that there are no allegations that petitioner's individual claim nor the individual claims of any of the members of the class whom petitioner purports to represent, exceed $3000.00 exclusive of interest and costs (R. 40).

3. In granting relief, the Federal Court of this District would be interfering with the internal management of a foreign corporation by interfering with or attempting to revise discretionary powers of the board of directors of each of the respondents already exercised or to be exercised in the future (R. 41).

4. Consideration of convenience, efficiency and justice required the courts to decline the jurisdiction (R. 39-40).

5. The statute of limitation applies to certain of the cases (R. 44).

The matter was heard before the Honorable Michael L. Igoe, Judge of the United States District Court upon said motions, as one matter, all of the respondents participating therein, and on November 4th, 1940, an identical order was entered in each of the cases involving each of the respondents dismissing the amended complaint; and a final order was likewise entered in each of said cases sustaining the motion of each of the respondents to dismiss petitioner's second amended complaint, and the Plaintiff, in each such case, electing to stand upon said second amended complaint and declining to plead further, each of said actions was dismissed at Plaintiff's costs.

On the same day, an order was entered pursuant to stipulation between each of the respective Plaintiffs and Defendants in the fifteen actions consolidating them for the purpose of review upon a single consolidated and abbreviated record (R. 50).

On the same date, November 4, 1940, their consolidated Notice of Appeal to the Circuit Court of Appeals for 7th Circuit was filed and upon the 4th day of December, 1940, the Statement of Points was filed (R. 54-56).

Upon the filing of the briefs by the respective parties, the matter was heard as a consolidated matter upon oral argument before Justices Evans, Major and Minton, and the opinion was written by Mr. Justice Minton (R. 63). A petition for rehearing was filed and on January 12, 1942, an order was entered in the Circuit Court of Appeals denying the petition for the rehearing of said cause (R. 70).

B.

STATEMENT AS TO JURISDICTION.

This Honorable Court may by certiorari have this cause certified to it for determination by virtue of Section 240 (a) of the Judicial Code, 28 USCA §347 (a).

The decision in the Circuit Court of Appeals was rendered November 15, 1941, (R. 63); the Petition for rehearing was filed within the time allowed and was denied on January 12, 1942, (R. 70).

C.

THE QUESTIONS PRESENTED.

I.

Does the United States District Court have jurisdiction to try the issues involved?

(a) Are the suits proper representative actions?

1. What relation do members of mutual life insurance companies bear with respect to the corporate entities?

2. What relation do members of mutual life insurance companies bear with respect to each other as such?

3. Are members of mutual life insurance companies limited in their interest in surplus only to the terms of their policies of insurance?

4. Do members of mutual life insurance companies have no rights in the assets of the companies (more specifically "surplus") other than those expressed in the policy?

(a) Do the interests in surplus stem from the contract of insurance of members of mutual life insurance companies?

5. What is the character of the interest in surplus funds of a member of a mutual life insurance company?

(a) Is the interest in surplus of members common and undivided?

II.

What is a mutual life insurance company?

(a) Are members of mutual life insurance companies entitled to insurance at actual cost?

D.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals for the Seventh Circuit erred in holding that the court was without jurisdiction to try the issues.

2. The Circuit Court of Appeals erred in holding that the amount in controversy was not sufficient to meet the jurisdictional amount required by law.

3. The Circuit Court of Appeals erred in holding that the suits were not proper class or representative suits.

4. The Circuit Court of Appeals erred in holding that the rights of members of mutual life insurance companies in the surplus funds of the companies were not common and undivided.

5. The Circuit Court of Appeals erred in holding that the members were limited to such rights as were expressly granted on the face of their policies, and that any other rights were non-existent.

6. The Circuit Court of Appeals has decided the questions of law contrary to the weight of authority.

7. The Circuit Court of Appeals failed to decide questions of the equities presented by the pleadings.

8. The Circuit Court of Appeals failed to decide the question of interference with internal management of foreign corporations.

9. The Circuit Court of Appeals failed to decide the question of the interest of members in mutual life insurance companies in surplus; similarly with the rights under the charters of such companies.

AUTHORITIES.

I.

This Honorable Court has indicated in its rules that a Petition for the Writ of Certiorari is properly supported by a showing that a Circuit Court of Appeals has decided an important question of local law in a way which is in conflict with applicable local decisions.

Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States.*
Rule 38, para. 5 (b).

II.

The issues involved present matters of such far-reaching consequence and of such public interest that this Court should grant the Petition for the Writ of Certiorari.

III.

Please see brief and argument appended hereto.

REASONS FOR GRANTING WRIT OF CERTIORARI.

1. The Circuit Court of Appeals has decided a question of law which has not been decided hitherto on the issues presented, and which this Court should decide.

2. The issues involved present matters of such far-reaching consequence to the public at large throughout the entire United States, that this Court should grant the Petition for the Writ of Certiorari.

3. The Circuit Court of Appeals has decided an important question of local law in a way which is in conflict with applicable local decisions.

4. It is respectfully submitted, that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SOL ANDREWS, et al.,
Petitioners,

By: DAVID H. CAPLOW and
SOL ANDREWS,
Counsel for Petitioners.